Supreme Court, U.S.
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No. ~~04-1319~~

In the

Supreme Court of the United States

ROGER MELTON, Individually and as next friend of his son, Jason Melton; SUE MELTON, Individually and as next friend of her son, Jason Melton; ADVOCACY, INCORPORATED
Petitioners,

v.

DALLAS AREA RAPID TRANSIT
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in holding that public transportation providers regulated under part B of Title II of the Americans with Disabilities Act (the ADA) are not required to make reasonable modifications to their programs to accommodate persons with disabilities.

2. Whether the Fifth Circuit erred in holding that the regulations in part A of Title II of the ADA do not apply to public transportation providers regulated under part B of Title II.

3. Whether the Fifth Circuit erred in holding that public transportation providers regulated under part B of Title II of the ADA are not required under the Rehabilitation Act to make reasonable modifications to their programs to accommodate persons with disabilities.

PARTIES TO THE PROCEEDING

The names of all parties to this proceeding appear on the cover page.

Pursuant to Rule 29.6 of this Court's rules, Petitioners state that Petitioner, Advocacy, Inc., is a non-profit corporation that has no stock. No publicly held company owns any interest in Advocacy, Inc.

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The Fifth Circuit Court of Appeals opinion is reported as *Melton v. DART,* 391 F.3d 669 (5th Cir. 2004).[1] The District Court opinion is reported as *Melton v. DART,* 326 F. Supp. 2d 767 (N.D. Tex. 2003).[2]

JURISDICTION

The Fifth Circuit filed its opinion on November 19, 2004, and denied the Meltons' Petition for Rehearing by order filed on January 5, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Fifth Circuit's decision on a writ of certiorari.

STATUTORY AND REGULATORY PROVISIONS INVOLVED[3]

Statutes

29 U.S.C. § 794(a)

42 U.S.C. § 12101(a)(5)

42 U.S.C. § 12131

42 U.S.C. § 12132

42 U.S.C. § 12133

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[1] Appendix, A–13

[2] Appendix, A–30

[3] The statutes and regulations are reproduced in the appendix. See index at A–1.

42 U.S.C. § 12134(a).

42 U.S.C. § 12143(b)

42 U.S.C. § 12149

Regulations

28 C.F.R. § 35.102(b)

28 C.F.R. § 35.130(b)(7)

28 C.F.R. pt. 35, App. A

49 C.F.R. § 27.7(a)(b)(4)(i)

49 C.F.R. § 27.19(a)

49 C.F.R. § 37.21(c)

49 C.F.R. pt. 37, App. D

STATEMENT OF THE CASE

Petitioners seek a writ of certiorari to review the Fifth Circuit's holding that Dallas Area Rapid Transit (DART), a local governmental provider of paratransit services, is not required to make reasonable modifications to its policies and procedures in order to pick up Jason Melton, a severely disabled paratransit rider, in the public alley behind his home instead of requiring him to travel a block down the alley to a pickup point on a street.

Jason was born on February 10, 1969. When he was thirteen, he was struck by a drunken driver while riding his bicycle. As a result of his injuries, he is non-verbal and mentally incompetent. His mental age is roughly that of a two-

year-old child.

Jason lives with his parents. He requires an electric winch to lift him from his bed and into a wheelchair or the bathtub. Jason's principal opportunity for instruction and socialization outside the family comes from trips to the Bachman Recreation Center. He requires an attendant to go with him on these trips and the use of paratransit services.

The Melton home, located in the northern part of Dallas, sits about six feet above the level of the street in front of it. Because of this difference in elevation, the front yard of the house presents a steep slope that prevents the Meltons from taking Jason down to the street in his wheelchair. The home has a rear garage opening onto a paved public alley. The Meltons have constructed a ramp in the garage that provides access for Jason to the rear drive and the alley.

DART is the designated local governmental agency for the providing of paratransit services to persons who are disabled in the area where the Meltons live. Jason is qualified to receive paratransit services by virtue of his previously described disability. From 1992 through the first part of 1999, DART provided paratransit services for Jason, which included picking him up in the paved public alley behind his house.

In 1999, DART suddenly refused to provide pickup in the alley and instead indicated it would pick Jason up at the end of the alley where it enters the street, a distance of two-tenths of a mile, or approximately one block, away.

Requiring Jason and his attendant to go down the alley with a wheelchair creates unreasonable safety problems. There is no sidewalk or paved area for operation of the wheelchair,

so that it has to go down the alley itself, creating a danger of collision with vehicles backing from driveways and driving down the alley.

Because of his brain injury, Jason cannot tolerate extremes of temperature. He is subject to seizures which may be brought on by these extremes. For this reason, it is important to limit the time he has to wait outside for the paratransit vehicle.

In the spring of 2000 and again in the winter of 2001, attorneys for Advocacy, Inc.,[4] wrote DART and requested modification of paratransit services so that Jason would be picked up in the alley behind his home. In both cases, DART responded by denying the request. AI requested an administrative appeal of DART's decision but DART declined to permit such an appeal.

REASONS FOR GRANTING THE PETITION

I. THE HOLDING OF THE FIFTH CIRCUIT CONFLICTS WITH THE PLAIN LANGUAGE OF THE ADA AND ITS IMPLEMENTING REGULATIONS.

II. THE HOLDING OF THE FIFTH CIRCUIT CONSTRUING THE ADA CONFLICTS WITH THE

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[4] Advocacy, Incorporated, is the designated Protection and Advocacy agency for the State of Texas under the Developmental Disabilities Act, 42 U.S.C. § 15043, and receives funding under a federal grant to the State of Texas for the provision of services to individuals with traumatic brain injuries pursuant to 42 U.S.C. § 300d-53.

OPINION OF ANOTHER CIRCUIT COURT.

III. THE HOLDING OF THE FIFTH CIRCUIT CONSTRUING THE REHABILITATION ACT CONFLICTS WITH THE PLAIN LANGUAGE OF THE ACT AND ITS IMPLEMENTING REGULATIONS, WITH OPINIONS OF THIS COURT, AND WITH THE OPINION OF ANOTHER CIRCUIT COURT.

Certiorari is sought because this case presents a question of extraordinary importance – whether public transit services are exempt from any need to comply with Title II, part A of the Americans with Disabilities Act,[5] from any need to comply with any part A regulations, and from providing reasonable modifications to services under both the ADA and the Rehabilitation Act.

The Fifth Circuit opinion will have an enormous impact. Respondent DART provides nearly 95 million rides per year, and almost 600,000 of those are for people whose disabilities are so severe that they cannot ride mainline transit.[6] Statewide, Texas transit systems provide over three-and-a-half million rides per year to passengers with disabilities or who are elderly.[7] Nationwide, there are over five thousand transit systems providing 103 million trips per year as part of their demand-responsive service (like the paratransit service at issue

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[5] 42 U.S.C. § 12131, et seq.

[6] http://www.dart.org/annualreport.asp?zeon=03ARmultimodal#multimodal.

[7] 2001 Texas Transit Statistics, p. 1 (Tex. DOT), http: //www.dot.state.tx.us/PTN/documents/stat2001.pdf.

here).[8]

The importance of transportation service to people with disabilities can neither be doubted, nor overstated. In passing the ADA, Congress explicitly recognized that "discrimination against individuals with disabilities persists in such critical areas as . . . transportation," 42 U.S.C. § 12101(a)(3), and transportation barriers have a discriminatory effect on people with disabilities. 42 U.S.C. § 12101(a)(5). President Bush, in announcing his "New Freedom Initiative" for people with disabilities stated: "Wherever any job or home, or means of transportation is unfairly denied because of a disability, we must work to change it. Wherever any barrier stands between you and the full rights and dignity of citizenship, we must work to remove it, in the name of simple decency and simple justice."[9] The United States Department of Transportation acknowledges that "[t]ransportation is a vital element of independent living for all Americans. Public transportation is especially important for people with disabilities, many of whom depend on it to achieve independent lives, to access jobs and social events and to sustain productive careers."[10]

The modification his parents requested for Jason

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[8] http://www.bts.gov/publications/national_transportation_statistics/2003/html/table_transit_profile.html.

[9] Remarks by the President in Announcement of New Freedom Initiative (Feb 1, 2001), http://www.whitehouse.gov/news/releases/20010201-3.html.

[10] http://www.disability.gov/digov-public/public/DisplayPage.do?parentFolderId=126.

Melton was quite modest. They requested DART to pick him up in the alley behind his house, as DART had done for seven years with no problems before its sudden change in policy, rather than requiring him to travel a block down the alley in his wheelchair.

If DART is not required to make reasonable modifications to its policies, many unnecessary hardships are likely to be visited on its paratransit customers. DART could refuse to drive into hospital and apartment parking lots, and require paratransit riders to enter and exit on the nearest public street. It could refuse to modify its plan requirements regarding time limits for pickups in order to meet special needs, and could unreasonably refuse to make pickups at certain locations to accommodate the problems of particular paratransit riders. DART has no appeal process for its paratransit customers to use in contesting such policies, and the Fifth Circuit decision leaves it free to act arbitrarily and capriciously, as it has done in Jason Melton's case.

This case has exceptional importance even beyond its impact on people with disabilities, because the Fifth Circuit opinion conflicts with the plain language of the statute, conflicts with relevant regulations, conflicts with agencies' interpretation of their own regulations, conflicts with the opinion of the District of Colombia Circuit Court of Appeals applying the ADA in *Burkhart v. Washington Metropolitan Area Transit Authority,* 112 F.3d 1207, 1210 (D.C. Cir. 1997), conflicts with opinions of the Supreme Court applying the Rehabilitation Act, including *Alexander v. Choate,* 469 U.S. 287 (1985), and conflicts with the opinion of the Eleventh Circuit applying the Rehabilitation Act in *United States v. Bd. of Trustees of the University of Alabama,* 908 F.2d 740, 751 (11th Cir. 1990).

I. THE HOLDING OF THE FIFTH CIRCUIT CONFLICTS WITH THE PLAIN LANGUAGE OF THE ADA AND ITS IMPLEMENTING REGULATIONS.

Statutory Provisions

Title II part A of the ADA provides that "Subject to the provisions of this title [Title II], no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.[11] A "qualified individual with a disability" means an individual with a disability who *"with or without reasonable modifications to rules, policies, or practices*, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2) (emphasis added).

With the help of an attendant, Jason is able to use paratransit services.[12] Thus, he is a qualified individual with

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[11] There is no doubt that DART is a "public entity" as defined by 42 U.S.C. § 12131(1). Appendix, A-4.

[12] Note that the modification that Jason seeks would not contravene the paratransit plan that DART has filed with the Federal Transit Administration, which, as described by the Fifth Circuit below, states that "riders using the system must wait at . . . [a] safe waiting area . . . as close as possible to the entrance of the pick-up location." Jason's entrance is on the public alley, and that is where he seeks to be picked up. Fifth Circuit opinion, Appendix, A-15.

a disability as defined above. Furthermore, there is simply nothing in Title II that excepts transit providers from the application of Title II part A. Part A plainly applies.

The Fifth Circuit would read into part A a limitation that is not there. The Fifth Circuit suggests that the only actionable discrimination by a transit provider is that which contravenes the transit plan.[13] To be sure, violating the plan is actionable discrimination, 42 U.S.C. § 12143(e)(4), but that is not the *only* form of actionable discrimination. The statute makes it clear that there are other forms as well. *See, e.g.*, 42 U.S.C. § 12143(e) (discrimination "includes" violation of the plan). Some are specific, *see* 42 U.S.C. § 12142(a); 42 U.S.C. § 12142(b); 42 U.S.C. § 12142(c); 42 U.S.C. § 12143(a), but the statute also provides a general prohibition against discrimination. 42 U.S.C. § 12132.[14] There is simply nothing in the statute stating that the general provision is inapplicable.

The Fifth Circuit apparently views the existence of certain specifically-defined kinds of discrimination as excluding the possibility that the general antidiscrimination provision also applies. Not only is there no statutory support for this view, it is contrary to the way the Fifth Circuit and other circuit courts have interpreted other civil rights laws,[15]

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[13] Fifth Circuit opinion, Appendix, A–23,24

[14] Appendix, A-4

[15] *See, e.g., Porter v. Adams*, 639 F.2d 273, 277-278 (5th Cir.Unit A 1981) (considering the Government Employee Rights Act [2 U.S.C. § 1201, *et seq.*], and stating: "The reasonable conclusion, therefore, is that by drafting § 717 to prohibit 'any discrimination', Congress intended to bar the federal government from engaging in all those forms

and is contrary to the way a prior panel of the Fifth Circuit has treated Title II of the ADA. That panel, unlike the panel considering the present case, recognized that the general antidiscrimination provision of Title II part A has general application, despite the fact that part B includes certain specific examples of unlawful conduct. *Coolbaugh v. State of Louisiana*, 136 F.3d 430, 437 (5th Cir. 1998), *cert. denied*, 525 U.S. 819 (1998), *recognized as overruled on other grounds, Reickenbacker v. Foster*, 274 F.3d 974,978 (5th Cir. 2001).

The Fifth Circuit's interpretation is also inconsistent with the statute's construction. Part B provisions define certain conduct as discriminatory "for purposes of Sec. 12132," *which is the part A provision* dealing with discrimination.[16] If part A provisions do not apply to part B, why did Congress relate part B definitions of discrimination back to part A? Clearly, Congressional intent was that the

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of discrimination identified in §§ 703 and 704, and others as well."); *Brazoria County, Tex. v. EEOC*, 391 F.3d 685, 691 (5th Cir. 2004); *Haddon v. Executive Residence at the White House*, 313 F.3d. 1352, 1356-7 (Fed. Cir. 2000)(considering whether prohibition of discrimination under the Government Employee Rights Act includes a prohibition against retaliation, even though retaliation is not specifically mentioned in the act, and holding "It is quite sensible to conclude that Congress intended for section 1202, and thus section 1219, to include reprisal. Protection against discrimination would be extremely thin if an employer could freely fire an employee for filing a discrimination claim.") *See also Ayon v. Sampson*, 547 F.2d 446, 449-50 (9th Cir. 1976); *Hale v. Marsh*, 808 F.2d 616,619 (7th Cir. 1986).

[16] *See* 42 U.S.C. §§ 12142; 12143; 12144; 12146; 12147; 12148; 12162. *See also Burkhart v. Washington Metro. Area Trans. Auth.*, 112 F.3d 1207, 1210 (D.C. Cir. 1997).

nondiscrimination provisions of part A would apply to part B. Part B simply adds specificity in certain areas; it does not supplant the more general provision in part A

There is simply nothing in the statutory language justifying the narrow view of discrimination evidenced in the Fifth Circuit opinion.[17] Moreover, the Fifth Circuit fails to give the deference due the opinions of the enforcing agencies.

Regulatory Provisions

In holding, without any statutory or case authority, that none of the regulations in Title II part A apply to any transit provider also covered by part B, the Fifth Circuit decision relies entirely on a single DOJ regulation, 28 C.F.R. § 35.102(b),[18] which provides:

> To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA (42 U.S.C. 12141), they are not subject to the requirements of this part.

This regulation simply does not support the Fifth Circuit's interpretation. The regulation does *not* say that public transit systems governed by part B are not subject the part A. Instead, it says that they are not covered *only to the*

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[17] The Fifth Circuit's view is also contrary to the Congressional finding that "individuals with disabilities continually encounter various forms of discrimination, including . . . failure to make modifications to existing facilities and practices . . .." 42 U.S.C. § 12101(a)(5). Appendix, A-3

[18] The Fifth Circuit decision erroneously refers to this provision as 29 C.F.R. § 35.102(b). Fifth Circuit opinion, Appendix, A-20; A-6

extent of the part B coverage. That is the only interpretation of the regulation that gives meaning to all its words.

In case there could be any doubt as to the meaning of this particular regulation, DOJ and DOT regulations and interpretations make it plain. DOJ explains that matters not specifically covered under part B are subject to the part A regulations. 28 C.F.R. Part 35 App.A, § 35.102 (Application).[19] Moreover, the DOT part B regulations provide that part B entities may be subject to the part A regulations. 49 C.F.R. § 37.21(c).[20] That provision makes clear that both the part A and part B rules apply to transit entities subject to DOT oversight, in the absence of a conflict. *Id.* See also 49 C.F.R. Part 37 App. D, § 37.21 (Applicability, General).[21] Regulations and interpretations by both the DOJ and the DOT obviate the need for part A's reasonable modification requirement to be repeated in part B, and that regulation, 28 C.F.R. § 35.130(7),[22] does apply to DART's operations.

Indeed, even in the absence of specific regulations, the law requires public entities to make reasonable modifications

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[19] Appendix, A-6

[20] Appendix, A-11

[21] Appendix, A-11

[22] 28 C.F.R. § 35.130(b)(7) provides that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." Appendix, A-6

of policies, practices, and procedures if necessary to avoid discrimination. *Alexander v. Choate,* 469 U.S. 287, 300-302 (1985) (interpreting Sec. 504 of the Rehabilitation Act); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273-277 (2d Cir. 2003) (interpreting ADA Title II). *See also Olmstead v. L. C.*, 527 U.S. 581, 591 (1999) (Title II).

In interpreting an agency's own regulation, the agency is accorded significant deference, and courts should give the agency's interpretation of its own rules controlling weight unless it is plainly wrong. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *see also Martin v.Occupational Safety and Health Review Comm'n,* 499 U.S. 144, 150-157 (1991).

The Fifth Circuit did not follow this precedent. Not only did it reject agency guidance, it engaged in a distorted interpretation of the DOJ regulation that directly conflicts with the parallel regulation by DOT.[23] The Fifth Circuit's interpretation also conflicts with the DOT's Section 504 regulations (as described in Part III below).

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[23] In enacting the ADA, Congress manifested a clear intent that public entities make reasonable modifications in order to avoid discriminating on the basis of disability. See 42 U.S.C. § 12101(a)(5), Appendix, A-3 Thus, the DOJ was not authorized to promulgate a regulation exempting public transit providers' services from that requirement, even if it was the DOJ's intent to do so. Clearly that was not DOJ's intent, as shown above.

II. THE HOLDING OF THE FIFTH CIRCUIT CONSTRUING THE ADA CONFLICTS WITH THE OPINION OF ANOTHER CIRCUIT COURT.

The Fifth Circuit opinion also conflicts with the analysis in *Burkhart v. Washington Metro. Area Trans. Auth.*, 112 F.3d 1207 (D.C. Cir. 1997), which states that part A regulations apply to entities regulated under part B.

> The relevant provision of the ADA is Title II which governs "public entities," including agencies of state and local governments. 42 U.S.C. §§ 12131(1), 12132. Title II is divided into two parts: Part A generally prohibits disability-based discrimination by any public entity. *Id.* § 12132. Part B provides specific examples of prohibited discriminatory conduct in the public transportation context. *Ib.* §§ 12142, 12143(a), 12144, 12146, 12147, 12148, 12162 (defining "discrimination for purposes of section 12132"). *Of course, public transportation providers are also subject to the general nondiscrimination mandate of Title II(A). See id.* § 12131 (defining a "public entity" subject to section 12132 as including "any commuter authority").

Burkhart, 112 F.3d at 1210 (emphasis supplied). The court in *Burkhart* went on to say in a footnote that "[o]n appeal, WMATA contends that Part A of Title II does not apply to providers subject to Part B. We decline to address this challenge as it was not properly preserved below." *Id.*, n.1.

The most reasonable interpretation of this footnote is

that the D.C. Circuit decided that part A regulations applied to part B entities without considering the improperly preserved challenge by the transportation authority. However, the Fifth Circuit held, in effect, that the D.C. circuit did not decide the question, thereby making the case one of first impression.[24]

Without citing supporting precedent, the Fifth Circuit rejected any reliance on *Burkhart*, finding that the case "decline[d] to address the contention that part A regulations do not apply to public transportation providers subject to part B because the contention was not properly preserved."[25]

Despite the Fifth Circuit's erroneous analysis, *Burkhart* clearly holds that the part A regulations do apply to part B activities. It holds that public transportation providers are subject to the nondiscrimination mandate of part A, then cites 28 C.F.R. § 35.160, a part A regulation, in support of the plaintiff's claim against a part B entity. *Id.*, 1210, 1211.[26]

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[24] Fifth Circuit opinion, Appendix, A-19

[25] Fifth Circuit opinion, Appendix, A-22, n. 6

[26] *Burkhart* has been followed in *Martin v. Metro. Atlanta Rapid Transit*, 225 F. Supp.2d 1362, 1373 (N.D. Ga. 2002), although the Fifth Circuit in effect says it should not have been followed. Fifth Circuit opinion, A-22, n. 6

III. THE HOLDING OF THE FIFTH CIRCUIT CONSTRUING THE REHABILITATION ACT CONFLICTS WITH THE PLAIN LANGUAGE OF THE ACT AND ITS IMPLEMENTING REGULATIONS, WITH OPINIONS OF THIS COURT, AND WITH THE OPINION OF ANOTHER CIRCUIT COURT.

The Fifth Circuit opinion summarily rejects Jason's claim under Section 504,[27] relying on an older Fifth Circuit case, *Hainze v. Richards,*[28] for the proposition that Section 504 and the ADA are interpreted consistently. Thus, it reasons, because it interprets the ADA to exempt public entities regulated under part B of Title II from all part A regulations (and thus from the requirement of making reasonable modifications), the exemption also extends to the Rehabilitation Act claim.[29] This analysis is overly simplistic, and it takes *Hainze* out of context.

The Fifth Circuit in *Hainze* relied on the ADA provision in 42 U.S.C. § 12133, which states that "[t]he remedies, procedures, and rights set forth in [Section 504] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." That provision specifies how *the ADA* is to be interpreted. It does not speak to how Section 504 is to be interpreted. The Fifth Circuit thus

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[27] Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, Appendix, A-3.

[28] *Hainze v. Richards,* 207 F.3d 795, 799 (5th Cir.), *cert. denied* 531 U.S. 959 (2000).

[29] Fifth Circuit opinion, Appendix, A-25

turned the provision relied on by *Hainze* on its head.

As an act predating the ADA, the Rehabilitation Act should be used as a guide in interpreting the ADA, instead of the other way around. As this Court said in *Toyota Motor Mfg., Kentucky, Inc. v. Williams,* 534 U. S. 184, 193 (2002), "Congress' repetition of a well-established term generally implies that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." *See also Bragdon v. Abbott,* 524 U.S. 624, 631 (1998); *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 437-438 (1986); *ICC v. Parker,* 326 U.S. 60, 65 (1945).

Section 504 has been conclusively interpreted to require covered entities to provide reasonable policy modifications. *Alexander v. Choate,* 469 U.S. 287, 300-302 (1985). In fact, Section 504 has been interpreted as requiring a transit provider to make reasonable program modifications. In *United States v. Board of Trustees for University of Alabama,* 908 F.2d 740, 751 (11th Cir.1990), the court held that transportation services provided to college students with disabilities were not equal to, nor as effective as, those offered to persons without disabilities, and the transportation provider failed to reasonably accommodate the persons with disabilities. The court of appeals held that, under the Supreme Court's interpretation of § 504, recipients of federal financial assistance are required to make reasonable modifications or accommodations, so long as they do not cause "undue financial or administrative burdens." *Id.*, 908 F.2d at 747, 751, *citing Southeastern Community College v. Davis,* 442 U.S. 397, 412-413 (1979), and *Alexander v. Choate,* 469 U.S. 287, 301 (1985).

Since the Rehabilitation Act requires reasonable modifications independently from the ADA, the Fifth Circuit

decision holding that it does not conflicts with the clear meaning of the act and the cases interpreting it.

Moreover, the sole authority (mistakenly) asserted for the Fifth Circuit's opinion regarding the ADA — the DOJ regulation at 28 C.F.R. § 35.102(b) — is inapplicable to Section 504, and there is no corresponding 504 regulation.[30] On the contrary, the DOT's Section 504 regulations expressly require compliance with a general antidiscrimination provision, 49 C.F.R. § 27.7(a), various specific discrimination provisions, 49 C.F.R. § 27.7(b)-(d), *and* the statutory and regulatory provisions in *both* part A and part B. 49 C.F.R. § 27.19(a).[31]

Clearly, whatever the nature of the ADA regulations, paratransit providers are not exempt from the Rehabilitation Act's antidiscrimination provisions just because the providers are also covered by the DOT's regulations in part B of Title II of the ADA.

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[30] In fact, the DOJ interpretation of 28 C.F.R. § 35.102 expressly notes that programs receiving federal assistance are covered by § 504 of the Rehabilitation Act. 28 C.F.R. pt 35, App. A, Appendix, A-7.

[31] 49 C.F.R. § 27.19(a) states in part that "[r]ecipients subject to this part (whether public or private entities as defined in 49 CFR part 37) shall comply with all applicable requirements of the Americans with Disabilities Act (ADA) of 1990 (42 U.S.C. 12101-12213) including the Department's ADA regulations (49 CFR parts 37 and 38), the regulations of the Department of Justice implementing Titles II and III of the ADA (28 CFR parts 35 and 36)....." Appendix, A-10.
See also 49 C.F.R. § 27.9(a).

CONCLUSION

The Supreme Court should grant this petition for a writ of certiorari and reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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Statutes

29 U.S.C. § 794(a)
Nondiscrimination under Federal Grants and Programs

(a) Promulgation of rules and regulations.

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

42 U.S.C. § 12101(a)(5)
Findings and purpose

(a)(5) Individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

42 U.S.C. § 12131
Definitions

(1) Public Entity
The term "public entity" means–

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of Title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communications, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12132
Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12133
Enforcement

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

42 U.S.C. § 12134(a)
Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

42 U.S.C. § 12143(b)
Paratransit as a complement to fixed route services

(b) Issuance of regulations

Not later than 1 year after July 26, 1990, the Secretary shall issue final regulations to carry out this section.

42 U.S.C. § 12149
Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this subpart (other than section 12143 of this title).

Regulations

28 C.F.R. § 35.102(b)
Application

(a) Except as provided in paragraph (b) of this section, this part applies to all services, programs, and activities provided or made available by public entities.

(b) To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B or title II of the ADA (42 U.S.C. 12141), they are not subject to the requirements of this part.

28 C.F.R. § 35.130(b)(7)
General Prohibitions against discrimination

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R., pt. 35, App. A

NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENTAL SERVICES

***

Section 35.102 Application

This provision specifies that, except as provided in paragraph (b), the regulation applies to all services, programs, and activities provided or made available by public entities, as that term is defined in § 35.104. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), which prohibits discrimination on the basis of handicap in federally assisted programs and activities, already covers those programs and activities of public entities that receive Federal financial assistance. Title II of the ADA extends this prohibition of discrimination to include all services, programs, and activities provided or made available by State and local governments or any of their instrumentalities or agencies, regardless of the receipt of Federal financial assistance. Except as provided in § 35.134, this part does not apply to private entities.

The scope of title II's coverage of public entities is comparable to the coverage of Federal Executive agencies under the 1978 amendment to section 504, which extended section 504's application to all programs and activities "conducted by" Federal Executive agencies, in that title II applies to anything a public entity does.

Title II coverage, however, is not limited to "Executive" agencies, but includes activities of the legislative and judicial branches of State and local governmental governments. All

governmental activities of public entities are covered, even if they are carried out by contractors. For example, a State is obligated by title II to ensure that the services, programs, and activities of a State park inn operated under contract by a private entity are in compliance with title II's requirements. The private entity operating the inn would also be subject to the obligations of public accommodations under title III of the Act and the Departments's title III regulations at 28 CFR, part 36.

Aside from employment, which is also covered by title I of the Act, there are two major categories of programs or activities covered by this regulation: those involving general public contact as part of ongoing operations of the entity and those directly administered by the entities for program beneficiaries and participants. Activities in the first category include communication with the public (telephone contacts, office walk-ins, or interviews) and the public's use of the entity's facilities.

Activities in the second category include programs that provide State or local governmental services or benefits.

Paragraph (b) of § 35.102 explains that to the extent that the public entities are covered by subtitle B of title II of the Act, they are subject to the regulation of the Department of Transportation (DOT) at 49 CFR, part 37, and are not covered by this part. The Department of Transportation's ADA regulation establishes specific requirements for construction of transportation facilities and acquisition of vehicles. Matters not covered by subtitle B, such as the provision of auxiliary aids, are covered by this rule. For example, activities that are covered by the Department of Transportation's regulation implementing subtitle B are not required to be included in the self-evaluation required by § 35.105. In addition, activities not specifically addressed by DOT's ADA regulation may be covered by DOT's regulation implementing section 504 for its federally assisted

programs and activities at 49 CFR part 27. Like other programs of public entities that are also recipients of Federal financial assistance, those programs would be covered by both the section 504 regulation and this part. Although airports operated by public entities are not subject to DOT's ADA regulation, they are subject to subpart A of title II and to this rule.

Some commentators asked for clarification about the responsibilities of public school systems under section 504 and the ADA with respect to programs, services, and activities that are not covered by the Individuals with Disabilities Education Act (IDEA), including , for example, programs open to parents or to the public, graduation ceremonies, parent-teacher organization meetings, plays and other events open to the public, and adult education classes. Public school systems must comply with the ADA in all of their services, programs, or activities, including those that are open to parents or to the public. For instance, public school systems must provide program accessibility to parents and guardians with disabilities to these programs, activities, or services, and appropriate auxiliary aids and services whenever necessary to ensure effective communication, as long as the provision of the auxiliary aids results neither in an undue burden or in a fundamental alteration of the program.

49 C.F.R. § 27.7(a)(b)(4)(i)
Discrimination prohibited

(a) General. No qualified handicapped person shall, solely by reason of his disability, be excluded from participation in, be denied the benefit of, or otherwise be subjected to discrimination under any program or activity that receives Federal financial assistance administered by the Department of Transportation

(b) Discriminatory actions prohibited..

***

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

***

(i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of disability;

49 C.F.R. § 27.19(a)
Compliance with Americans with Disabilities Act requirements and FTA policy

(a) Recipients subject to this part (whether public or private entities as defined in 49 CFR part 37) shall comply with all applicable requirements of the Americans with Disabilities Act (ADA) of 1990 (42 U.S.C. 12101-12213) including the Department's ADA regulations (49 CFR parts 37 and 38), the regulations of the Department of Justice implementing Titles II and III of the ADA (28 CFR parts 35 and 36) and the regulation of the Equal Employment Opportunity Commission (EEOC) implementing title I of the ADA (29 DFR part 1630).Compliance with the EEOC title I regulations is required as a condition of compliance with section 504 for DOT recipients even for organizations which, because they have fewer than 25 or 15 employees, would not be subject to the EEOC regulation in its own right. Compliance with all these regulations is a condition of receiving Federal financial assistance from the Department of Transportation. Any recipient not in compliance with this requirement shall be subject to enforcement action under subpart F of this part.

49 C.F.R. § 37.21(c)
Applicability: General

(c) Entities to which this part applies also may be subject to ADA regulations of the Department of Justice (28 CFR, parts 35 or 36, as applicable). The provisions of this part shall be interpreted in a manner that will make them consistent with applicable Department of Justice regulations. In any case of apparent inconsistency, the provisions of this part shall prevail.

49 C.F.R., pt. 37, App. D

TRANSPORTATION SERVICES FOR INDIVIDUALS WITH DISABILITIES

Subpart B–Applicability

Section 37.21 Applicability, General

This section emphasizes the broad applicability of part 37. Unlike section 504, the ADA and its implementing rules apply to entities whether or not they receive Federal financial assistance. They apply to private and public entities alike. For entities which do receive Federal funds, compliance with the ADA and part 37 is a condition of compliance with section 504 and 49 CFR, part 27, Dot's section 504 rule.

Virtually all entities covered by this rule also are covered by DOJ rules, either under 28 CFR, part 36, as state and local program providers or under 28 CFR part 35 as operators of places of public accommodation. Both sets of rules apply; one does not override the other. The DOT rules apply only to the

entity's transportation facilities, vehicles, or services; the DOJ rules may cover the entity's activities more broadly. For example, if a public entity operates a transit system and a zoo, DOT's coverage would stop at the transit system's edge, while DOJ's rule would cover the zoo as well.

DOT and DOJ have coordinated their rules, and the rules have been drafted to be consistent with one another. Should, in the context of some future situation, there be an apparent inconsistency between the two rules, the DOT rule would control within the sphere of transportation services, facilities and vehicles.

United States Court of Appeals
Fifth Circuit
FILED
November 19, 2004
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10043

ROGER MELTON, Individually and as next friend of his son, Jason Melton; SUE MELTON, Individually and as next friend of her son, Jason Melton; ADVOCACY, INCORPORATED,

Plaintiffs - Appellants,

versus

DALLAS AREA RAPID TRANSIT,

Defendant - Appellee.

Appeal from the United States District Court for the Northern District of Texas

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Before GARWOOD, JOLLY and BARKSDALE, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Between 1992 and early 1999, Dallas Area Rapid Transit's paratransit service picked up the disabled Jason Melton in the alley directly behind his house. Dallas Area Rapid Transit ("DART") discontinued this practice in early 1999, citing safety concerns. Since 1999, DART has picked up Jason where the alley meets the street, approximately one block away from the house. Plaintiffs-appellants Roger and Sue Melton, as next friends of their disabled adult son Jason Melton, and Advocacy, Incorporated (collectively the "Meltons" seek an injunction requiring defendant-appellee DART to make "reasonable modification" to its paratransit services to require alley pick-up for Jason, contending that the failure to modify its plan is in violation of title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131, *et. seq.*, and section 504 of the Rehabilitation Act, 29 U.S.C. §§ 794, *et. seq.*. We hold that DART is not required by the ADA or the Rehabilitation Act to make reasonable modification to its paratransit services. This holding means that the Meltons have failed to establish a prima facie case of discrimination under either the ADA or the Rehabilitation Act, and we thus affirm the judgment of the district court.

I

Jason Melton is a disabled individual who qualifies for DART's paratransit services. The front yard of the Melton home, in which Jason lives with his parents, includes a steep slope that prevents the Meltons from taking Jason down to the street in his wheelchair. Instead, the Meltons have constructed a ramp in their garage to allow Jason access to the rear drive and paved public alley.

Although DART's paratransit service previously had picked up Jason in the alley directly behind the house, DART has picked up Jason where the alley meets the street since 1999.

The Meltons cite numerous health, safety, and convenience concerns resulting from the pick-up's relocation to the end of the alley.

DART's current paratransit plan -- which is approved as compliant with title II of the ADA by the Federal Transit Administration ("FTA") -- provides curb-to-curb, shared-ride service for people with disabilities who are unable to use DART's fixed route system of buses or trains. DART's "Guide to Paratransit Service" provides that riders using the system must wait at the sidewalk, or at another safe waiting area in front of, or as close as possible to, the entrance of the pick-up location. The rider is responsible for travel to the pick-up location; that is to say, DART has no responsibility under the plan to get the rider to the point of pick-up. Paratransit drivers are instructed to wait for riders at the curb of a public street, in front of, or as close as possible to, the rider's house, building or other designated pick-up location.

On February 5, 2002, the Meltons filed this action against DART, contending that DART's refusal to pick up Jason in the alley directly behind his house constituted illegal discrimination against Jason under the ADA and the Rehabilitation Act. They sought an injunction requiring DART to make "reasonable modification" to its paratransit services to provide an alleyway pick-up for Jason.

DART moved for summary judgment arguing that the law does not require it to make reasonable modification to its paratransit service. The Meltons concurrently filed an opposing motion for partial summary judgment. The district court granted DART's motion for summary judgment and denied the Meltons' motion for partial summary judgment, holding that neither the ADA nor the Rehabilitation Act required DART to make reasonable modification to its paratransit service. *Melton*

v. Dallas Area Rapit Transit, 326 F.Supp.2d 767 (N.D. Tex. 2003). The Meltons filed a timely motion for a new trial, which was effectively a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). The district court denied this motion, and the Meltons filed a timely notice of appeal.

II

This court reviews a district court's order granting a party's summary judgment motion *de novo*. *Whittaker v. BellSouth Telecomm., Inc.* 206 F.3d 532, 534 (5th Cir. 2000). Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In making this determination, the court must evaluate the facts in the light most favorable to the nonmoving party. *Whittaker*, 206 F.3d at 534.

A

The Americans with Disabilities Act[1], 42 U.S.C. §§ 12101, *et. seq.*, was passed by Congress with the specific mandate of eliminating discrimination against individuals with disabilities. *See* 42 U.S.C. § 12101(b) (1). The focus of this

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[1] The Meltons also raise a claim under section 504 of the Rehabilitation Act. 29 U.S.C. § 794(a). The Rehabilitation Act claim is discussed in Section II(C) of this opinion; however, the following discussion relating specifically to the ADA is also applicable to the Rehabilitation Act. Jurispridence interpreting either section is applicable to both title II of the ADA and section 504 of the Rehabilitation Act. *See Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir.), *cert. denied*, 531 U.S. 959 (2000)

case is title II of the ADA, which covers discrimination in the provision of public services. *See* 42 U.S.C. §§ 12131, *et. seq.* Title II is divided into two parts: part A covers public services generally, 42 U.S.C. §§ 12131, *et. seq.*; part B applies specifically and only to public transportation provided by public entities, 42 U.S.C. §§ 12141, *et. seq.*. It is undisputed that DART's paratransit service is covered by part B of title II; the parties dispute the application of part A to the issue presented in this case.

A plaintiff must first establish a prima facie case of discrimination before relief under the ADA can be considered. To establish a prima facie case of discrimination under the ADA, a plaintiff must demonstrate: (1) that he is a qualified individual within the meaning of the ADA; (2) that he is being excluded from participation in, or being denied benefits of, services, programs, or activities for which the public entity is responsible, or is otherwise being discriminated against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination is by reason of his disability. *Lightbourn v. County of El Paso, Texas*, 118 F.3d 421, 428 (5th Cir. 1997).

The parties agree that Jason Melton is a qualified individual within the meaning of the ADA. The second element of the prima facie case, however, is a point of contention. The district court concluded, and DART argues on appeal, that the Meltons failed to show that Jason has been excluded from participation in, or is being denied the benefits of, DART's paratransit service. *See Melton*, 326 F.Supp.2d at 771. Although Jason has not been entirely prohibited from using DART's paratransit service, the Meltons argue that Jason has been denied "meaningful access" because the discontinuation of alleyway pick-ups makes his use of the system dangerous and extremely difficult. The Meltons assert that the district court erred by not applying a "meaningful access" standard to

evaluate the Meltons' claims of denial of access. Although Supreme Court precedent suggests that denial of "meaningful access" is equivalent to a full denial of access under the ADA[2] we need not decide whether the "meaningful access" standard should be applied here; the district court's application of an incorrect standard of access is not reversible error unless the Meltons also demonstrate discrimination on the basis of Jason's disability, the third element of the prima facie case.

Thus, we turn to the question of whether the failure of DART to modify its plan constituted discrimination prohibited by the ADA and the Rehabilitation Act. Discrimination on the basis of disability differs from discrimination in the constitutional sense. *Reickenbacker v. Foster*, 274 F.3d 974, 981 (5th Cir. 2001) (citing *Thompson v. Colorado*, 258 F.3d 1241, 1254 (10th Cir. 2001). To determine whether DART discriminated against Jason on the basis of his disability, we examine the ADA itself and its own definitions of discrimination[3]. If the ADA requires reasonable modification of

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[2] *See Alexander v. Choate*, 469 U.S. 287, 301 (1983) (stating in the context of the Rehabilitation Act that a benefit cannot be offered in a way that "effectively denies" otherwise qualified handicapped individuals to "meaningful access" to which they are entitled); *see also Brennan v. Stewart*, 834 F.2d 1248, 1261 (5th Cir. 1988). Although this circuit has not addressed this issue under the ADA, other circuits have extended *Alexander*'s "meaningful access" standard to the ADA. *See e.g., Jones v. City of Monroe, Mich.*, 341 F.3d 474, 479-80 (6th Cir. 2003); *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001).

[3] The Meltons also argue that DART's refusal to perform alleyway pickups constitutes "other discrimination" under the second element of the prima facie case. This argument need not be addressed separately because it requires the same legal analysis as determining

DART's paratransit plan, the Meltons may have stated a prima facie case of discrimination and in which case we assume that summary judgment in favor of DART would be inappropriate. On the other hand, if the ADA imposes no such requirement, as we hold, the Meltons have failed to establish a prima facie case and summary judgment is appropriately granted to DART.

We now turn to the question at the heart of this case: whether a paratransit service that is consistent with an FTA-approved plan is sufficient for compliance with the ADA, or whether the ADA requires a public transportation system to make reasonable modifications to its paratransit service. This difficult question is an issue of first impression not only for our Court, but for all circuits. A proper analysis requires an examination of both the statutory and regulatory frameworks of the ADA.

As we have noted above, title II of the ADA is divided into two subparts. Part A governs all public entities, and part B applies specifically to the provision of public transportation by public entities. 42 U.S.C. §§ 12131-12134; 42 U.S.C. §§ 12141-12150. The Attorney General is directed to promulgate regulations to implement part A under 42 U.S.C. § 12134. But, it is the Secretary of Transportation who is directed to promulgate regulations to implement part B under 42 U.S.C. § 12149 and specifically to promulgate regulations regarding paratransit service under 42 U.S.C. § 12143(b).

DART argues that the ADA does not require reasonable

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whether DART discriminated against Jason on the basis of his disability under the third element of the prima facie case. Both require this Court to determine what constitutes discrimination in the context of the ADA.

modifications of paratransit service, although it acknowledges that public entities generally are required by 28 C.F.R. § 35.130(b) (7) to make reasonable modifications to avoid discrimination on the basis of disability:

> A public entity shall make reasonable modification in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

Part B, however, is explicitly excepted from the reasonable modifications requirement:

> To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA (42 U.S.C. 12141), they are not subject to the requirements of this part.

29 C.F.R. § 35.102(b). Thus, DART argues that because paratransit services are covered by part B, they are not subject to regulations promulgated by the Attorney General under 28 C.F.R. part 35. Instead, paratransit services are subject only to Department of Transportation regulations found in 49 C.F.R. part 37. The Department of Transportation regulations contain no analogous provision requiring reasonable modification to be made to paratransit services to avoid discrimination.

Aside from these regulations, DART further argues that the statute itself does not require reasonable modification. DART contends that because paratransit services are not intended to be a comprehensive system of transportation to

meet the needs of individuals with disabilities, a modification provision is inappropriate. The purpose of paratransit service is to provide service to individuals with disabilities comparable to the level of public transportation services provided to non-disabled individuals. 42 U.S.C. § 12143(a). DART argues that the FTA review of the paratransit plan stands in the place of any reasonable modification requirement for determining compliance with the ADA. This is true because the FTA evaluates whether the plan meets the ADA's stated requirement of service comparable to the entity's fixed route service. 49 C.F.R. § 37.147(d).

On the other hand, the Meltons argue that both the regulations and the statutory language require DART to make reasonable modifications to its paratransit service. The Meltons interpret 28 C.F.R. § 35.102(b) as applying the Attorney General's, as well as the Secretary of Transportation's, regulations to transportation services *except* where a conflict arises between the two. Relying on references to modification in both congressional findings reflected in the statute[4] and the definitions in 42 U.S.C. § 12131(2)[5], the Meltons argue that the requirement of reasonable modifications should be understood

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[4] "Individuals with disabilities continually encounter various forms of discrimination, including . . . *failure to make modifications to existing facilities and practice* . . . ." 42 U.S.C. § 12101(a) (5) (emphasis added).

[5] "The term 'qualified individual with a disability' means an individual with a disability who, *with or without reasonable modifications* to rules, policies, or practices . . . meets the essential eligibility requirements for receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131 (2) (emphasis added). This definition applies to terms used in title II.

to cover both part A and part B of title II. Because part A is a general provision and part B provides specific examples of discrimination and remedies in the public transportation context, the Meltons assert that nothing in part B demonstrates congressional intent to exempt providers of public transportation from general requirements under part A[6]. Furthermore, the Meltons assert that the regulations themselves acknowledge that 28 C.F.R. part 35 applies to part B:

> Entities to which this part applies also may be subject to ADA regulations of the Department of Justice (28 C.F.R. parts 35 or 36, as applicable). The provisions of this part shall be interpreted in a manner that will make them consistent with applicable Department of Justice regulations. In any case of apparent inconsistency, the provisions of this part shall prevail.

49 C.F.R. § 37.21(c) (describing the general applicability of the regulations); *see also* 28 C.F.R. App. A to part 35; 49 C.F.R. App. D to part 37.

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[6] The Meltons cite case law in support of this proposition, arguing that *Martin v. Metro. Atlanta Rapid Trans. Auth.*, 255 F.Supp.2d 1362, 1373 (N.D. Ga. 2002), and *Burkhart v. Washington Metro. Area Trans. Auth.*, 112 F.3d 1207, 1210 (D.C. Cir. 1997), hold that regulations in part A do apply to entities regulated under part B. This assertion is misleading because the court in *Burkhart*, on which *Martin* relies, explicitly declines to address the contention that part A regulations do not apply to public transportation providers subject to part B because the contention was not properly preserved. *Burkhart*, 112 F.3d at 1210 n.1.

We are unconvinced that either the ADA or its implementing regulations require DART to make reasonable modification to its paratransit service to accommodate Jason Melton. We reason as follows. Paratransit services are provided as a complement to fixed route service for qualified individuals. 42 U.S.C. § 12143.

The ADA provides in 42 U.S.C. § 12143 a comprehensive scheme detailing the requirements for compliance with the ADA, including a definition of discrimination to be used in determining compliance of paratransit services with the ADA.

> It shall be considered discrimination for purposes of section 12132 of this title . . . for a public entity which operates a fixed route system . . . to fail to provide with respect to the operations of its fixed route system, in accordance with this section, paratransit and other special transportation services to individuals with disabilities, including individuals who use wheelchairs, that are sufficient to provide to such individuals a level of service (1) which is comparable to the level of designated public transportation services provided to individuals with disabilities using such system. .

42 U.S.C. § 12143(a). Accordingly, public entities operating a fixed route system are required to submit a plan annually to the Secretary of Transportation, who reviews the plan to determine whether the plan meets the requirements of 42 U.S.C. § 12143(a). 42 U.S.C. §§ 12143(c) (7) & (d). These requirements include providing a level of service with paratransit service comparable to the services provided to

individuals without disabilities using the fixed route system. *See* 49 C.F.R. § 37.147. Once the plan is approved, the public entity is required to provide paratransit services in accordance with the plan. Providing paratransit services not in accordance with the plan is the prohibited discrimination. 42 U.S.C. § 12143(e) (4).

Because paratransit service is meant to act as the disability complement to established fixed route transportation services, this comprehensive regulatory scheme signals that no interim extra-plan modification is statutorily or otherwise required by a public entity when the public entity is properly operating under a FTA-approved plan. The FTA-approved plan is itself the accommodation to the disabled by the public transportation entity. It is the violation of the plan itself that constitutes the prohibited discrimination under title II, not the failure to modify the plan to address particularized complaints. The Meltons do not assert that DART is operating in a manner that is not in accordance with its FTA-approved paratransit plan[7] and, therefore, the ADA does not impose a requirement upon DART to modify its plan to serve Jason Melton's particular demands.

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[7] The Civil Rights Office of the FTA issued a decision in a factually similar complaint that stated that the discontinuation of alley pick-ups did not make DART's paratransit service deficient. The exact pick-up and drop-off sites are operational issues to be determined by DART. Although this decision has no precedential value for the case before us, it demonstrates one of the avenues open to the Meltons and similarly situated individuals to challenge DART's provision of services. Among other options, dissatisfied individuals may challenge the plan itself as not providing comparable service or challenge service as not in compliance with the plan. In short, our decision in this case does not relegate disabled individuals to voiceless acceptance of subpar transportation merely because the ADA does not require reasonable modification to paratransit services.

The regulations likewise do not impose a duty on DART to make reasonable modifications of its paratransit service. Although the regulations acknowledge that aspects of the provision of public transportation *may* be regulated by Department of Justice regulations, *see, e.g.*, 49 C.F.R. § 37.21(c), the plain language of 28 C.F.R. § 35.102(b) cannot be ignored:

> To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA (42 U.S.C. 12141), *they are not subject to the requirements of this part.*

(Emphasis added). It is undisputed that the operation of DART's paratransit service is covered by 42 U.S.C. §§ 12141, *et. seq.*, and that the Secretary of Transportation has been directed by statute to issue regulations relating specifically to paratransit transportation. Furthermore, even if the Secretary of Transportation only has the authority to promulgate regulations relating directly to transportation, the reasonable modification requested by the Meltons relates specifically to the operation of DART's service and is, therefore, exempt from the Attorney General's regulations in 28 C.F.R. part 35. To the point, the ADA's implementing regulations impose no requirement on DART to make reasonable modifications to its paratransit service.

C

Finally, we hold that the Rehabilitation Act does not provide an independent basis for requiring DART to make reasonable modification to its paratransit service. Section 504 of the Rehabilitation Act provides

> no otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . . .

29 U.S.C. 794(a).[8] Congress intended to extend the protections of the Rehabilitation Act to cover all programs of state or local governments when it passed the ADA. *See Hainze*, 207 F.3d at 799. The language of title II generally tracks the language of section 504 of the Rehabilitation Act. The remedies, procedures and rights available under title II are those available under Section 504. 42 U.S.C. § 12133. We decline to find that a right to reasonable modification in paratransit services is created by the Rehabilitation Act when an identical right does not exist under the ADA. We hold that DART is not required by the Rehabilitation Act to make reasonable modification to its paratransit service.

III

For the aforementioned reasons, we hold that DART is

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[8] The prima facie case of discrimination under the Rehabilitation Act is operationally identical to the test under the ADA, requiring a plaintiff to allege: (1) the existence of a program or activity within the state which receives federal financial assistance; (2) the plaintiff is an intended beneficiary of the federal assistance; and (3) *the plaintiff is a qualified handicapped person, who solely by the reason of her handicap has been excluded from participation in, been denied benefits from, or otherwise has been subject to discrimination under such program or activity. See Brown v. Sibley*, 650 F.2d 760, 769 (5th Cir. 1981).

not required by either the ADA or the Rehabilitation Act to make reasonable modification to its paratransit service. The Meltons have failed to establish a prima facie case of discrimination under either the ADA or the Rehabilitation Act, and summary judgment was appropriately granted to DART. The judgment of the district court is therefore

AFFIRMED.

U.S. COURT OF APPEALS
FILED
JAN 5, 2005
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10043

ROGER MELTON, Individually and as next friend of his son, Jason Melton; SUE MELTON, Individually and as next friend of her son, Jason Melton; ADVOCACY, INCORPORATED,

Plaintiffs - Appellants,

v.

DALLAS AREA RAPID TRANSIT,

Defendant - Appellee.

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING EN BANC

(Opinion 11/19/04, 5 Cir., _____, _____F.3d _____)

Before GARWOOD, JOLLY and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing en Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ E. Grady Jolly
United States Circuit Judge

REHG-6a

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
NOV 25, 2003
CLERK U.S. DISTRICT COURT
By S/
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROGER MELTON, individually and as next friends of their son, Jason Melton, and ADVOCACY, INCORPORATED,	§	
Plaintiffs,	§	
v.	§	CA 3:02-CV-0236-R
DALLAS AREA RAPID TRANSIT,	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

Before the Court is Dallas Area Rapid Transit's (Defendant" or "DART") Motion for Summary Judgment and Plaintiffs' Motion for Partial Summary Judgment. Plaintiffs Roger and Sue Melton, individually and as next friends of their son, Jason Melton, and Advocacy, Incorporated ("Plaintiffs") filed this suit against DART for violations of title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, *et. seq.* ("ADA") and Section 504 of the Rehabilitation Act of

1973, 29 U.S.C. § 794 ("Rehabilitation Act"). Jason Melton ("Jason") is an individual with a disability. Plaintiffs claim that DART's discontinuance of paratransit-service pickups via Plaintiffs' alley constitutes discrimination on the basis of Jason's disability. Plaintiffs also claim that DART failed to make reasonable modifications to their service plan to accommodate Jason's disability in violation of the ADA. Plaintiffs request injunctive relief, declaratory relief, and attorneys' fees.

For the reasons stated below, Defendant's Motion for Summary Judgment is **GRANTED**, and Plaintiffs' Motion for Partial Summary Judgment is **DENIED**.

I. FACTUAL BACKGROUND

Due to injuries sustained in 1982, Jason requires the use of a wheelchair and the daytime assistance of an attendant. Jason lives in Dallas with his parents, who have modified their home to accommodate Jason's special needs. Plaintiffs' house sits approximately six feet above the street on which it is located, and the resultant slope prevents Jason from using the front entrance to gain street access. In addition to other modifications, Plaintiffs have built a ramp in their garage which enables Jason to access the rear driveway and the alley behind the house. Jason regularly travels to the Bachman Recreation Center, which provides his principal opportunity for instruction and socialization outside the home. For these trips, Jason requires both the assistance of an attendant and the use of paratransit services. Jason's injuries make him sensitive to extreme temperatures.

DART, a regional transportation authority that receives federal funding, operates a "fixed route system" of public transportation with complementary paratransit services.

DART's paratransit system is a curb-to-curb, shared-ride program for people with disabilities who are unable to use DART buses or trains. It also provides some limited door-to-door service. According to DART's "A Guide to Paratransit Services," riders must be "waiting at the sidewalk, or at another safe waiting area in front of , or as close as possible to, the entrance of the pick-up location. Operators will wait for a rider at the curb of a public street, in front of, or as close as possible to, the rider's house, building, or other designated pick-up location." The rider must travel to the pickup location. DART's program does not include pickups in alleyways, and it has been approved by the Federal Transit Administration as compliant with title II of the ADA and the Rehabilitation Act.

From 1992 through early 1999, DART provided Jason with paratransit service, which included picking him up in the paved public alley behind Plaintiffs' house. In June of 1999, DART received a complaint about paratransit vans picking up a rider in an alley behind his house. After learning that some contract drivers for DART were picking up riders in alley ways, DART examined its service plan and the safety hazards associated with alley pickups. DART concluded that safety concerns precluded its continuance of alleyway pickups and that DART would strictly enforce its curb-to-curb policy. It is disputed whether safety concerns indeed justify the cessation of alleyway pickups. In 1999, after DART discontinued its practice of alley-way pickups, another paratransit rider filed a "Title II of the Americans with Disabilities Act/Section 504 of the Rehabilitation Act of 1973 Discrimination Complaint Form" over DART's decision to enforce its curb-to-curb program. The Civil Rights Office of the Federal Transit Authority responded to the complaint by supporting Defendant's discontinuance of alleyway pickups. Specifically, DART's actions with regard to delivery of ADA complementary paratransit service was found not to be deficient.

DART paratransit vehicles arrive for a pickup at any time within at 20-minute "ready-time" window, and vehicles are to leave after waiting five minutes for the passenger. DART issues riders who fail to appear for a scheduled pickup with "No-Show" violations. Passengers who receive three No-Shows within a 30-day period will receive a service suspension of 30 days. DART's curb-to-curb program requires that Jason be picked up at the entrance to the alley, approximately one block away from his home. Jason must be transported to the end of the alley to be picked up in a variety of weather conditions.

II. ANALYSIS

A. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure allows summary judgment only when the moving party demonstrates that there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Melton v. Teachers Ins. & Annuity Assoc. of Am.*, 114 F.3d 557, 559 (5th Cir. 1997). The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file together with affidavits, if any, which it believes demonstrates the absence of a genuine issue of material fact. *See Celotex Corp.*, 477 U.S. at 323.

Once the movant has discharged its initial burden under Rule 56, the nonmovant must set forth specific facts, by affidavits or otherwise, that show a genuine issue for trial. *See Topalian v. Ehrman*, 954 F.2d 1125, 1132 (5th Cir. 1992), *cert. denied*, 506 U.S. 825 (1992). In weighing the evidence, the court must decide all reasonable doubts and inferences in the

light most favorable to the nonmovant. *See Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988); *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 640 (5th Cir. 1985). As long as there appears to be some support for the disputed allegations such that "reasonable minds could differ as to the import of the evidence," the motion for summary judgment must be denied. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Summary judgment for the defendant will be granted if the plaintiff fails to make a showing sufficient to establish a material issue of fact as to the existence of an element essential to its case. *See Celotex*, 477 U.S. at 322.

B. Plaintiffs' ADA Claims

Plaintiffs first advance claims of discrimination on the basis of disability under title II of the ADA. Plaintiffs contend both that Jason was discriminated against and that DART unlawfully failed to make reasonable modifications of its paratransit system.

To establish a prima facie case of discrimination under title II of the ADA, Plaintiffs must prove: (1) that Jason is a qualified individual under the Act; (2) that Jason is being excluded from participation in, or being denied benefits of, services, programs, or activities for which Defendant is responsible, or otherwise is being discriminated against by DART; and (3) that such exclusion, denial of benefits, or discrimination is by reason of Jason's disability. *Lightbourn v. County of El Paso, Texas*, 118 F.3d 421, 428 (5th Cir. 1997). Jason is a qualified individual under the ADA. Under the second prong, no genuine issue of material fact remains. Plaintiffs have failed to show that Jason has been excluded from participation in, or is being denied the benefits of DART paratransit service. Although alleyway pickups have ceased,

DART has not excluded Jason from participation in the paratransit program, and he has not been denied paratransit services. Rather, Plaintiffs claim that alleyway pickups constitute a reasonable modification to paratransit service provision that DART should be required to undertake. Defendant is entitled to summary judgment as to Plaintiffs' ADA claim of discrimination.

While Plaintiffs maintain that DART's paratransit system generally complies with the ADA, Plaintiffs contend that DART's failure to make reasonable modifications to their paratransit plan to allow alleyway pickups constitutes discrimination on the basis of Jason's disability. This argument hinges on whether 28 C.F.R. § 35.130(b)(7), which requires that public entities make reasonable modifications to policies when necessary to avoid discrimination on the basis of disability, unless the public entity demonstrates that the modifications would fundamentally alter the nature of the service, applies to DART's provision of paratransit services. Plaintiffs claim that 28 C.F.R. § 35.102(b) indicates that because subtitle B of title II of the ADA fails to mention reasonable modifications, the reasonable modifications provision of subtitle A, 28 C.F.R. § 35.130(b)(7), controls. It states:

> To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA (42 U.S.C. 12141), they are not subject to the requirements of this part.

Subtitle B of title II of the ADA explicitly covers the provision of paratransit services, and paratransit services are subject to the regulation of the Department of Transportation at 49 C.F.R. part 37. Section-by-Section Analysis, app. A to pt. 35 at § 35.102. The requirement of reasonable modifications,

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however, apperas only in subtitle A. "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994). In this case, statutory language requiring reasonable modifications appears in subtitle A, but not subtitle B, of title II of the ADA.

Generally, DART must provide individuals with disabilities with service comparable to that of designated public transportation services provided to individuals with disabilities. 42 U.S.C. § 12143(a). DART may lawfully opt to provide a higher level of paratransit servies than that required by subtitle B of the ADA, but is not required to do so. 42 U.S.C. § 12143(f)(1). Notably, Congress instructed that title II's transportation regulations are to "establish minimum service criteria." 42 U.S.C. § 12143. Even if the intent of Congress remained unclear, as Plaintiffs argue, the court must determine whether an administrative agency's interpretation is based on a permissible construction of the statutes at issue. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). DART forwarded a complaint it received regarding its discontinuance of alleyway pickups to the Department of Transportation's Federal Transit Administration. It found DART's actions with respect to paratransit services in compliance with the ADA. Although this response by the Federal Transit Administration to a single, relevant complaint does not warrant *Chevron*-style deference, it holds persuasive power. *Henrikson v. Guzik*, 249 F.3d 395, 398 (5th Cir. 2001). But this court need not go so far as to examine the reasonable modifications provision in this way. Subtitle B of title II provides Plaintiffs with no claim for a reasonable modification. Defendant is granted summary judgment as to Plaintiffs' claim that DART unlawfully failed to make reasonable modifications to its paratransit program.

C. Plaintiffs' Rehabilitation Act Claims

The language of title II of the ADA generally tracks the language of section 504 of the Rehabilitation Act, and it was intended to extend the Rehabilitation Act to cover all state and local programs. *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000), *reh'g en banc denied*, 216 F.3d 1081 (5th Cir. 2000), *cert. denied*, 530 U.S. 959 (2000). As such, "the 'remedies, procedures, and rights' available under Section 504 shall be the same as those available under Title II." *Id.* A prima facie case of discrimination under Section 504 of the Rehabilitation Act requires that Plaintiffs show: (1) that Jason is a qualified individual with a disability; (2) that Jason was excluded from participation in, denied benefits of, or subjected to discrimination under Defendant's paratransit program solely because of his disability; and (3) that Defendant's paratransit system receives federal financial assistance. 42 U.S.C. § 794(a). Jason is a qualified individual under the Rehabilitation Act, and DART receives federal financial assistance. At issue is whether DART discriminated against Jason on the basis of his disability. As with the title II claim, Plaintiffs have failed to demonstrate that DART has discriminated against Jason by reason of his disability.

Again, Plaintiffs argue that DART's failure to make reasonable modifications to their current paratransit plan constitutes discrimination on the basis of disability. To comply with the Rehabilitation Act and continue to receive federal financial assistance, DART must comply with the ADA. 49 C.F.R. 37.21(b). Because the relevant statutes of the ADA contain no reasonable modifications provision, this claim fails as a matter of law as it applies to the Rehabilitation Act.

There are no genuine issues of material fact relating to these claims, and Defendant's Motion for Summary Judgment

is granted as to Plaintiffs' Rehabilitation Act claims.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is **GRANTED**. Plaintiffs' Motion for Partial Summary Judgment is **DENIED**.

IT IS SO ORDERED.

SIGNED THIS 25 DAY OF NOVEMBER 2003.

S/Jerry Buchmeyer
JERRY BUCHMEYER
SENIOR U.S. DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
NOV 5, 2003
CLERK U.S. DISTRICT COURT
By S/
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROGER MELTON, and SUE MELTON, individually and as next friends of their son, JASON MELTON, and ADVOCACY, INCORPORATED,	§	
Plaintiffs,	§	
v.	§	CA 3:02-CV-0236-R
DALLAS AREA RAPID TRANSIT,	§	
Defendant.	§	

FINAL JUDGMENT

Defendant's Motion for Summary Judgment was GRANTED as to all claims on November 25, 2003. Pursuant to Rule 58 of the Federal Rules of Civil Procedure, it is

ORDERED that Plaintiffs' case against Defendant is

DISMISSED with prejudice. Costs are hereby taxed against the parties who incurred them.

Signed the 25th of November, 2003.

S/Jerry Buchmeyer
JERRY BUCHMEYER
SENIOR U.S. DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
NOV 5, 2003
CLERK U.S. DISTRICT COURT
By S/
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROGER MELTON, and SUE MELTON, individually and as next friends of their son, JASON MELTON, and ADVOCACY, INCORPORATED,	§	
Plaintiffs,	§	
v.	§	CA 3:02-CV-0236-R
DALLAS AREA RAPID TRANSIT,	§	
Defendant.	§	

ORDER

Plaintiffs' MOTION FOR NEW TRIAL (filed December 5, 2003) is DENIED.

It is so ORDERED.

Signed the 11th of November, 2003.

S/Jerry Buchmeyer
JERRY BUCHMEYER
SENIOR UNITED STATES.
DISTRICT JUDGE
NORTHERN DISTRICT OF
TEXAS